IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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| SUMMIT CARBON SOLUTIONS, LLC,<br><br>Petitioner,<br><br>v.<br><br>IOWA UTILITIES BOARD, A DIVISION OF THE DEPARTMENT OF COMMERCE, STATE OF IOWA,<br><br>Respondent,<br><br>And<br><br>SIERRA CLUB IOWA CHAPTER and OFFICE OF CONSUMER ADVOCATE,<br><br>Intervenors. | Case No. CVCV062900<br><br>**SUMMIT CARBON'S BRIEF IN RESISTANCE TO SIERRA CLUB'S MOTION FOR SUMMARY JUDGMENT** |

On December 14, 2021, Summit Carbon Solutions, LLC ("Summit Carbon") filed this action seeking a temporary and permanent injunction against the Iowa Utilities Board ("Board") enjoining the release of certain mailing lists that were voluntarily provided by Summit Carbon upon informal request from Board staff. These lists, which show where notice of a required informational meeting regarding Summit Carbon's carbon dioxide pipeline project were mailed, were requested from the Board by Sierra Club Iowa Chapter ("Sierra Club") under Iowa Code chapter 22, the Iowa Open Records Act ("Act").

Summit Carbon argued that, among other reasons, the disclosure should be enjoined as it was covered by an exception to the Act, Iowa Code Section 22.7(18). That exception provides, in relevant part:

> The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information:
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> . . .
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> 18. Communications not required by law, rule, procedure, or contract that are made to a government body or to any of its employees by identified persons outside of government, to the extent that the government body receiving those communications from such persons outside of government could reasonably believe that those persons would be discouraged from making them to that government body if they were available for general public examination. As used in this subsection, "persons outside of government" does not include persons or employees of persons who are communicating with respect to a consulting or contractual relationship with a government body or who are communicating with a government body with whom an arrangement for compensation exists. Notwithstanding this provision:
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> a. The communication is a public record to the extent that the person outside of government making that communication consents to its treatment as a public record.
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> b. Information contained in the communication is a public record to the extent that it can be disclosed without directly or indirectly indicating the identity of the person outside of government making it or enabling others to ascertain the identity of that person.

On February 11, 2022, the Court ruled on the motion for temporary injunction, granting that relief and enjoining disclosure. In that Order, however, the Court, for purposes of the permanent injunction, focused on the issue of whether Summit Carbon's provision of the list to the Board was voluntary or whether it was "required by law, rule, procedure, or contract." In light of the Order, and from the summary judgment briefing of all of the parties, it appears this is the sole remaining issue in the case.

On March 21, 2022, having issued a set of discovery requests intended to obtain incomplete information, and having obtained responses from the Board five days earlier, Sierra Club filed a very short Motion for Summary Judgment, resting on a single, slender reed: the Board provided a list of other cases where it had requested informational meeting mailing lists.

Sierra Club infers that because such lists had been requested in cases other than that of Summit Carbon, that the Board must have a "procedure."[1]

This issue clearly is not suitable for summary judgment. Iowa Rule of Civil Procedure 1.981(3) allows for summary judgment only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Here, as demonstrated in Summit Carbon's Response to Sierra Club's Statement of Uncontested Facts, and Summit Carbon's own Statement of Facts Precluding Summary Judgment, there are disputes over the material and central facts regarding whether the provision of the mailing lists to the Board by Summit Carbon was voluntary or compelled by a procedure. The Board itself concedes that the issue is not sufficiently clear to be determined as a matter of law on summary judgment. The factual record – looking at both the Board's responses to Sierra Club's discovery and the Board's response to discovery from Summit Carbon – makes the genuine and material disputes plain.

Sierra Club asked the Board in discovery (specifically Interrogatory No 2) to list those dockets where the Board had requested similar lists be provided by a permit applicant. That, however, provides an incomplete picture. As the Board itself concedes in its responsive summary judgment brief,

> For most of the history of such proceedings, the Board did not request or require the filing of such information. The Board further asserts that from mid-2019 until December of 2021, the Board requested landowner information from ***most, but not all***, petitioners for electric transmission line franchises, natural gas pipeline permits, or hazardous liquid pipeline permits. Lastly, the Board asserts that the evidence in this case will show that the Board has not requested or required landowner information to be provided in relation to such dockets since December 2021.

[1] There is no statute or rule requiring submission of such lists. No party has claimed otherwise, nor has any party claimed there is a contract. Thus, the sole issue is whether it was a Board "procedure."

IUB Answer to Sierra Club's Motion for Summary Judgment at 2 (Emphasis added.) In sum, out of the entire history of such dockets, for a brief 18-month period the Board requested (not required) landowner information from ***some but not all*** applicants. And in some cases it appears the request was for a map, not a list. Moreover, there were no new hazardous liquids pipeline dockets at all during that time prior to Summit Carbon providing its lists, so there is no evidence whatsoever of a "procedure" relevant to this particular type of case.

Summit Carbon engaged in follow-up discovery from the Board, asking for a list of all cases involving a public information meeting to see when landowner list information was requested and when it was not. *See* Summit Carbon Appendix at 1 – 4; 6 – 9 (Answers to Summit Carbon Interrogatories 1 and 2 and attached list). That more complete list shows several things that preclude summary judgment:

- Since 2016, the Board has not requested a list of persons to which notice of an informational meeting was provided ("Informational Meeting Landowner List") in most cases before the Board.

- Even when the Board started requesting the lists on some occasions, it did not in most. With respect to E, P, HLP, and GCU dockets (where informational meetings are typically required):

    - In 2016, the IUB requested an Informational Meeting Landowner List in one docket, and did not request an Informational Meeting Landowner List in the eight other dockets before it.

    - In 2017, the IUB did not request an Informational Meeting Landowner List in any of the 15 dockets before it.

    - In 2018, the IUB did not request an Informational Meeting Landowner List in any of the 14 dockets before it.

    - In 2019, the IUB requested an Informational Meeting Landowner List in three of the dockets before it, and did not request an informational Meeting Landowner List in the seven other dockets before it.

  - In 2020, the IUB requested an Informational Meeting Landowner List in three of the dockets before it, and did not request an informational Meeting Landowner List in the five other dockets before it. (IUB Answers to Summit Carbon Solutions' Interrogatory No. 1 and Attachment).

- With regard to the Dakota Access pipeline (HLP-2014-001) no request was made for the informational meeting mailing list – those meetings occurred in 2014, the pipeline permit was granted in 2016 – but the Board states it ordered a list of landowners with actual final pipeline easements (not the broader, preliminary list at issue here) in 2020, as part of an amendment procedure.

- Every docket other than Dakota Access where landowner information was requested prior to Summit Carbon providing its lists is an electric transmission docket ("E-dockets") – for more similar natural gas pipelines ("P-dockets"), such lists have never been requested; every P-docket shows as a "No." (See rows 13 and 33).

- The specifics of what is requested or what the Board accepted change from case to case – often it is a list or a map, sometimes (row 54) just a map, in row 63 it is the mailing receipts.

- More recently, in January 2022 (row 72), the Board withdraws a request for a list.

*See* App. 6 – 9.

The evidence shows that the Board's requests for some type of landowner information in linear infrastructure projects have not been consistently made, have not been consistent in form, and have not been of sufficient duration to be considered a "procedure" for purposes of Iowa Code §22.7(18).

Given this, the Board's response to Summit Carbon Interrogatory 2 should be no surprise. Summit Carbon asked the Board to

> Identify any order, rule, ***or other written policy statement*** where this practice of requesting a list or map". . . was (i) set forth publicly where stakeholders could learn of the policy; and (ii) internally at the IUB."

App. 4 (emphasis added). The Board identified only the December 16, 2022 Order which post-dates Summit Carbon's submission of its lists. *Id*. Summit then asked the Board to "Describe

how this policy change in June 2019 was made (i.e. was there a vote of the Board, was there a written rationale for changing the policy, etc.)" The Board responded:

> No formal policy change was announced or promulgated by the Board in June of 2019 in regard to requests for informational meeting landowner mailing lists.

*Id*.

While Summit Carbon chose not to file a cross-motion for summary judgment, the record makes it apparent that there is nothing sufficiently clear, consistent, and concrete to be considered an agency "procedure" of obtaining informational meeting mailing lists in pipeline cases. In context, the undefined term "procedure" is used in §22.7(18) as being similar to statutes, rules and contracts. As such, it should be read to require some formality of structure and consistency of operation; it cannot merely be ephemeral, something that provides a party no notice or warning to guide the party's decisions and choices.

The extent to which the Board has required landowner information, the specifics of what was required, when it was required, how consistently it was required – and how those factors impact the statutory term "procedure" -- are all disputed facts or disputed application of law to facts precluding summary judgment in this case. The Court should deny Sierra Club's Motion for Summary Judgment.

Respectfully submitted this 12th day of May, 2022

By: */s/ Brant M. Leonard*
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**ATTORNEYS FOR SUMMIT CARBON SOLUTIONS, LLC.**

## CERTIFICATE OF SERVICE

The undersigned certifies that on the 12th of May, 2022, the foregoing document was electronically filed with the Clerk of Court using the EDMS system which will send a notice of electronic filing to all counsel of record registered with the EDMS system.

*/s/ Brant M. Leonard*